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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 568

ROBERT G. LASSITER,

Petitioner,

vs.

A. H. POWELL, R. R. HERRING, E. N. CLEMENT AND JOHN S. WATKINS, TRUSTEES FOR THE CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MURRAY ALLEN,
Attorney for Petitioner.

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Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your petitioner, Robert G. Lassiter, feeling himself aggrieved by a certain judgment or decree of the United States Circuit Court of Appeals for the Fourth Circuit, rendered in the case of Robert G. Lassiter, Appellant, *vs.* A. H. Powell, R. R. Herring, E. N. Clement and John S. Watkins, Trustees for the Creditors and Stockholders of the First National Bank of Granville, Appellees, which judgment or decree was rendered and became final for the purpose of review in this Court on the 5th day of November, 1947, prays this Honorable Court to issue its writ of certiorari, as authorized so to do by the provisions of Section

347(a), Title 28, of the United States Code, addressed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding it to certify and transmit to this Court, on a day therein named, a full and complete transcript of the record and all proceedings had in the courts of the United States in said case in so far as the same appear of record or on file in said United States Circuit Court of Appeals for the Fourth Circuit, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such relief and remedy in the premises as this Court may deem appropriate and justice and right may require.

I

The case may be summarized and the matter involved may be stated briefly as follows:

This is a suit in equity on two lost notes executed by Robert G. Lassiter, the defendant, and payable to National Bank of Granville, Oxford, N. C. One note was dated November 25, 1932, for $15,500.00 and was payable in ninety days; the other was dated February 11, 1933, for $1,000.00, and was payable in sixty days. The plaintiffs are the trustees for the creditors and stockholders of the First National Bank of Granville, Oxford, N. C. The District Court found the facts and entered judgment for plaintiffs for the face value of the notes with interest. The principal contention of defendant in the trial court and in the Circuit Court of Appeals was that this action could not be maintained on the two notes for the reason that a note executed by Robert G. Lassiter, the defendant, in the sum of $15,500.00, dated August 21, 1933, and payable to the First National Bank of Granville one year after date, was accepted by plaintiffs in *settlement* of all of defendant's notes held by the bank, aggregating $17,000.00, which included the notes in suit.

It is contended by defendant that the acceptance of the note for $15,500.00 in settlement of the two notes in suit appears as matter of law from findings of fact of the trial court, which were not disturbed by the Circuit Court of Appeals, and by the undisputed testimony of one of the plaintiffs.

NOTE: References herein to Record pages are also references to pages of Appendix to Brief for Appellant in the Circuit Court of Appeals.

II

The basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question is as follows:

This is a suit in equity on two lost notes executed by Robert G. Lassiter, defendant, and payable to the National Bank of Granville, Oxford, N. C. One note was dated November 25, 1932, for $15,500.00 and was payable in ninety days; the other was dated February 11, 1933, for $1,000.00; and was payable in sixty days. The plaintiffs are the trustees for the creditors and stockholders of the First National Bank of Granville, Oxford, N. C. The District Court found the facts and entered judgment for plaintiffs for the face value of the notes with interest. From this judgment, defendant appealed to the Circuit Court of Appeals. The appeal was argued October 8, 1947, and decided November 5, 1947, by an opinion (164 F. (2d) 186), in which the Circuit Court of Appeals affirmed the judgment of the District Court of the United States for the Eastern District of North Carolina. The principal contention of defendant in the trial court and in the Circuit Court of Appeals, and the question presented by this petition, was that this action could not be maintained on the two notes for the reason that a note executed by Robert G. Lassiter, the defendant,

in the sum of $15,500.00, dated August 21, 1933, and payable to the First National Bank of Granville one year after date, was accepted by plaintiffs in *settlement* of all of defendant's notes held by the bank, aggregating $17,000.00, which included the two notes in suit.

Section 347, Title 28, of the United States Code, provides:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower courts, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

III

The question presented and the reasons relied on for the allowance of the writ are as follows:

Should judgment of the Circuit Court of Appeals, affirming judgment of the District Court in equity for the amount of two lost notes, one for $15,500.00 and one for $1,000.00, be reversed when it appears from facts found by the District Court, which are undisturbed by the Circuit Court of Appeals, and the undisputed testimony of one of the plaintiffs that a note executed by defendant for $15,500.00 had been accepted by plaintiffs in settlement of the two notes in suit?

The Circuit Court of Appeals holds in an opinion filed November 5, 1947, that the note for $15,500.00, tendered in settlement of the two notes in suit, was not accepted and that the District Court was not in error in rendering judgment for plaintiffs.

In the Findings of Fact by the trial court will be found the following facts relative to acceptance of the compromise note:

"1. The plaintiffs are residents of Granville County, North Carolina, the defendant is a resident of the State of Florida, and the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The notes sued on are (1) a note in the principal amount of $15,500.00 dated November 25, 1932, due ninety days after date and bearing interest at six per cent from maturity, and (2) a note in the principal amount of $1,000.00 dated February 11, 1933, due sixty days after date and bearing interest at six per cent from maturity. The aggregate indebtedness represented by the two notes was originally owed by Robert G. Lassiter & Company to the National Bank of Granville and the First National Bank of Oxford, which two institutions, prior to the execution of the notes in suit, were merged and became the First National Bank of Granville. The defendant in this action was the President and principal stockholder of Robert G. Lassiter & Company and had personally endorsed the original notes in renewal of which the personal notes of the defendant now in suit were executed.

"2. On and prior to March 5, 1933, the First National Bank of Granville was a national banking institution doing business in Oxford, North Carolina, and had acquired certain assets formerly belonging to the National Bank of Granville and the First National Bank of Oxford. Among such assets were the two notes payable to the National Bank of Granville, which are in suit. These notes and others, aggregating $17,500.00, were secured by bond executed by Consolidated Indemnity and Insurance Company, dated November 19, 1932, in the amount of $17,500.00 (Rec., p. 160).

"3. On March 5, 1933, the First National Bank of Granville was closed by proclamation of the President of the United States and ordered to suspend further operations as a banking institution; shortly thereafter and prior to August, 1933, J. W. Medford was appointed as Conservator of said Bank by the Comptroller of the Currency and until about December 19, 1933, was the appointed and acting Conservator of the Bank with such duties and authority as defined and limited by United States Code, Title 12, Sections 203 and 192. Prior to March 5, 1933, the First National Bank of Granville had pledged certain of its assets to the Reconstruction Finance Corporation and among such assets were the two notes in suit:

"4. On August 30, 1933, the defendant addressed a letter to, 'First National Bank of Granville, Oxford, N. C., Attention: Mr. J. W. Medford, Conservator,' as follows:

'GENTLEMEN:

'With further reference to my conversation with you relative to my notes, I wish to advise as follows:

'You hold a note for $4,200.00, which is a renewal of a balance of two notes originally given to W. Z. Mitchell. The note which you hold is, I understand, endorsed by the bank as administrator of the estate of W. Z. Mitchell. You are familiar with the facts with respect to this note. The sum of $500.00 in cash was paid by me on the purchase price of the interest of Mr. Mitchell in the Bullock and Mitchell Warehouse. A note for $4,500.00 was given to Mr. Mitchell at the request of the bank and payments of $300.00 were later made on this note. The bank received the sum of $800.00 from me. I have never received a penny from Mr. Mitchell or the Mitchell estate and the purchase of the Mitchell interest in the property was never consummated. At the time the renewal note was given to the bank Mr. Yancey, of your bank, advised that you would endeavor to work out the Mitchell proposition in such way that

I would be relieved of further liability and the $800.00 which I had paid would be refunded.

'You hold three notes executed by me aggregating $17,000.00 and guaranteed by bond of the Consolidated Insurance & Indemnity Co. These notes I understand are all past due. It is my desire to put the entire matter in the most satisfactory shape possible at this time. I have, therefore, arranged with the Consolidated Insurance & Indemnity Co. for a new agreement guaranteeing the payment of my note in the sum of $15,500.00, payable August 21, 1934. In arriving at the amount I have taken credit for the sum of $800.00 paid as a part of the principal of the Mitchell transaction and the sum of $860.00 paid to you as interest on the Mitchell note. I feel that as you have received these payments they should be applied as a credit on my note. I also feel that under the circumstances I should not be expected to undertake payment of the Mitchell note. I am authorized by the Consolidated Insurance & Indemnity Co. to offer you my note in the sum of $15,500.00 guaranteed by that Company in settlement of all of the notes signed by me, which you now hold.

'I wish to say that this is the best proposition which I am able to work out and I am doing this in order to put my account with you in the best possible shape under present conditions.

'I am handing you herewith note and guaranty, subject to and in compliance with the conditions above set out.

'Very truly,

'(S.) Robt. G. Lassiter.'

"There were attached to this letter a note of the defendant and a bond executed by Consolidated Indemnity & Insurance Company, each in the amount of $15,500.00. The letter, enclosing note and bond, came into the possession of J. W. Medford, Conservator, on or immediately after its date. As of the date of the receipt of the letter, note and bond, W. T. Yancey was a Director of the Bank, his resig-

nation as President having been accepted at a meeting of the Directors of the Bank on January 10, 1933 (Rec., pp. 160, 161, 162).

* * * * * * *

"11. On or about May 29, 1934, the Consolidated Indemnity & Insurance Co. was forced into liquidation, and on February 8, 1937, the plaintiffs herein filed with the Superintendent of Insurance of the State of New York, as Liquidator for such Company, a claim in the principal sum of $16,500.00, which was specifically based upon the notes in suit and the indemnity contract of the Consolidated Indemnity & Insurance Co., which undertook to guarantee payment of the notes in suit. This claim was thereafter allowed for fifty per cent of its face, that is, $8,250.00, but prior to this action by the Liquidator the plaintiffs were required to assign to the Liquidator the two notes in suit as well as the alleged compromise note of $15,500.00, dated August 21, 1933, and on February 8, 1937, such assignment was made in writing and signed under oath by R. R. Herring, Vice Chairman of plaintiffs, and is in words and figures as follows:

> 'For value and without recourse the Liquidating Trustees of the First National Bank of Granville do hereby transfer, make over and assign to the Superintendent of Insurance of the State of New York, as Liquidator of the Consolidated Indemnity & Insurance Company, his successors and assigns, the hereto attached three notes of Robert G. Lassiter, for identification described as follows:
>
> 'First Note: Dated at Oxford, N. C., November 25, 1932, in the sum of $[illegible].00, payable ninety days after date to the National [illegible] of Granville or order (Rec., p. 164).
>
> 'Second Note: Dated at Oxford, N. C., February 11, 1933, in the sum of $1,000.00, payable sixty days after date to the National Bank of Granville, or order.

'Third Note: Dated at Oxford, N. C., August 21, 1933, in the sum of $15,500.00, payable on or before one year after date to the First National Bank of Granville, or order.

'All of the aforesaid notes are at the date of this assignment the property of the Liquidating Trustees of the First National Bank of Granville.

'This February 8, 1937.

'Liquidating Trustees of the
'First National Bank of Granville,
'By R. R. Herring,
'Vice-Chairman.'

"This claim was proved with the Liquidator of the Consolidated Indemnity & Insurance Co. for the benefit of the defendant, who requested and urged plaintiffs to do so. At the time of filing the claim for payment of the dividend of $8,250.00, the amount in which the original claim had been allowed, the plaintiffs took from the Liquidator a written agreement allowing plaintiffs, at their option, to require at any time reassignment to them of the three notes transferred upon refund to the Liquidator of all dividends theretofore received. The notes in suit and the alleged compromise note were delivered to the Liquidator of the Consolidated Indemnity & Insurance Co. and were assigned by separate paper writing as set out, but they were not actually endorsed by the plaintiffs or any one of them, or by any one of them. Between the date of the allowance of the claim for $8,250.00 and the 11th day of April, 1944, plaintiffs received dividends on the claim in the aggregate of $495.00, and prior to April 11, 1944, the plaintiffs made a refund to the Liquidator of this amount and demanded reassignment and redelivery of the notes which had been transferred to the Liquidator as set out. As of this date the two notes in suit had been lost and have not been found after a careful,

thorough, and diligent search in such quarters and in such places as it is reasonable to believe they might be located (Rec., pp. 164, 165, 166).

"12. On April 11, 1944, the Liquidator of the Consolidated Indemnity & Insurance Co. executed a paper writing transferring and assigning to the plaintiffs all of the right, title and interest in and to the two notes in suit which had been lost, and the alleged compromise note, all of which had been assigned to the Liquidator on February 8, 1937, as set out.

"13. At the time of the transfer of the three notes to the Liquidator on February 8, 1937, plaintiffs delivered to the Liquidator the three bonds of the Consolidated Indemnity & Insurance Co. guaranteeing payment of the notes, and at the time of the reassignment of the notes to the plaintiffs on April 11, 1944, these three bonds were returned to plaintiffs (Rec., p. 166).

* * * * * * *

"19. The agreement by which plaintiffs were originally made liquidating trustees authorized them to sell, compromise, and accept renewals incident to the liquidation. As of December 19, 1933, the First National Bank of Granville had become solvent as the result of waivers executed by depositors of forty per cent of their claims, and a sale to the Oxford National Bank of a sufficient portion of its assets to pay waiving depositors the remaining sixty per cent. Soon after December 19, 1933, the original Liquidating Trustees moved to their new quarters the 'Class B Assets' which had been transferred to them, and also the defendant's letter of August 30, 1933, as well as the note and bond, each in the amount of $15,500.00, therein mentioned (Rec., p. 167).

* * * * * * *

"21. The bond of the Consolidated Indemnity & Insurance Co. transmitted with defendant's letter of August 30, 1933, contains the following language:

" 'Whereas, the said indebtedness has now been reduced to a total of not more than Fifteen Thousand Five Hundred and 00/100 Dollars ($15,500.00) and the bank is now willing to renew the said note or notes of R. G. Lassiter, so that such note or notes, and renewals thereof will be fully paid on or before August 21, 1934' " (Rec., p. 168).

In addition to the foregoing facts, we call particular attention to the following testimony of R. R. Herring, Vice Chairman of the Liquidating Trustees, plaintiffs, who appears from the evidence to have been in charge of all negotiations of the Liquidating Trustees dealing with the notes of the defendant, with respect to the finding of Lassiter's letter in the early part of 1944:

"Q. What was the occasion of finding the letter?

"A. We had been trying to get together with Mr. Lassiter in some way to see if we couldn't get liquidation of these notes and get him to come to some agreement and in those conversations it came up something about this note, the first I had ever heard of it, his giving his note at the bank to cover all of his indebtedness.

"Q. Who said something about it?

"A. Mr. Lassiter. We went back and searched the records. I don't know how many hours I did spend trying to find any information I could get on this case and I found this letter and when I found it I thought, 'Sure, here is Mr. Lassiter's letter and his admission and I am sure we can get together now.'

"Q. The reason you say that is because you said, 'Here is where we find note of Mr. Lassiter and letter from him. He certainly will admit he signed this note and letter along

with it,' and you reached the conclusion for that reason he would be agreeable?

"A. We were negotiating for compromise.

"Q. Why did you jump to the conclusion that Mr. Lassiter would agree to a compromise?

"A. Because he admitted he owed the note.

"Q. You knew he would admit writing the letter and admit the execution of the note and admit having given it to Medford?

"A. I didn't know whether he would admit all those things. I knew he would admit writing the letter, which he did.

"Q. Where did you find the letter?

"A. I couldn't tell you what file it is in but most of those files were more or less back numbers now stored over my store and through some of the files in looking for this letter or looking for any information I could find I found this letter.

"Q. You found the letter and already had the note and bond?

"A. Yes, sir.

"Q. That is referred to in the letter?

"A. Yes, sir.

"Q. Since you found that letter in January, 1944, you have kept the note?

"A. We haven't had the note since we found the letter in our possession. We have got title to it" (Rec., pp. 56 to 58).

Petitioner contends that it appears as matter of law from the foregoing findings of fact and undisputed testimony that contrary to the decision of the Circuit Court of Appeals and in accordance with the law applicable in the State of North Carolina, plaintiffs accepted defendant's note for $15,500.00 in full settlement of the two notes in suit.

It is further contended by defendant, petitioner, that plaintiffs, respondents, accepted the compromise note (1) by their conduct and (2) by their silence, and that, if plaintiffs did not know that the note of August 21, 1933, for $15,500.00 was given in compromise, and not as a renewal note, they were put on notice by the bond securing the note that it was in settlement of the notes in suit and it was their duty to investigate and that such investigation would have disclosed the fact that the note was in compromise of all of defendant's notes held by the bank and transferred to plaintiffs, including the two notes in suit.

Petitioner contends that he suffered injury in that the judgment requires him to pay notes which were paid prior to the institution of this suit in the amounts of $15,500.00, with interest at six per cent from the 25th day of February, 1933, until paid, and $1,000.00, with interest at the rate of six per cent from the 11th day of April, 1933, until paid.

WHEREFORE, because of said decision and judgment the foregoing important question of local law was decided in a way probably in conflict with applicable local decisions, your petitioner prays that a writ of certiorari to review said judgment be issued to said United States Circuit Court of Appeals for the Fourth Circuit, as in such cases is provided by Section 347(a), Title 28, of the United States Code.

ROBERT G. LASSITER,
Petitioner,

By MURRAY ALLEN,
His Attorney.

SUPREME COURT OF THE UNITED STATES

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No. 568

ROBERT G. LASSITER,

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vs.

A. H. POWELL, R. R. HERRING, E. N. CLEMENT AND JOHN S. WATKINS, TRUSTEES FOR THE CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE,

Respondents

BRIEF

Petitioner, defendant, submits that the findings of fact by the trial court and the undisputed testimony of R. R. Herring, one of the plaintiffs, all of which is quoted in the foregoing petition, establish as matter of law and in accordance with the law of the State of North Carolina, that plaintiffs accepted the note of defendant for $15,500.00, dated August 21, 1933, in settlement of the two notes in suit for $15,500.00 and $1,000.00.

"Where the offeree exercises dominion over things which are offered him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance."

American Law Institute's Restatement of Contracts, Sec. 72(2).

"Such acceptance may be manifested by words of conduct showing that the offeree means to accept; for, while it is generally held that the intention to accept is a necessary element of acceptance, the question of intent may usually be resolved by what the offeree did or said. As a general rule, his mere silence will not amount to assent; but if he declines to speak when speech is admonished at the peril of an inference from silence, his silence may justify an inference that he admits the truth of the circumstance relied on or asserted."

May v. *Manzies,* 184 N. C. 150.

"It is true that in order to valid agreement the minds of the parties must have met on the same thing at one and the same time; but this is said in reference to the common intent as contained and expressed in the communications had between them. This may be by words, written or unwritten, or by conduct, both or either; but it must be in some way expressed, or it does not bind, and the position may not be allowed that when the parties have made an agreement for valuable consideration, clearly expressing their common intent and purpose in one way, this can be frustrated or altered by the secret and undisclosed intent of one of the parties to the contrary."

Rodgers v. *Bell,* 156 N. C. 378.

That plaintiffs exercised dominion over the compromise note is beyond dispute. They transferred and delivered the note to the Liquidator of Consolidated Indemnity and Insurance Company in support of a claim based upon bonds executed by that company guaranteeing payment of certain of defendant's notes, including the compromise note and in the document effecting the transfer the compromise note is specifically described and it is recited that this note and

the two notes in suit were "at the date of this assignment the property of the Liquidating Trustees of the First National Bank of Granville," plaintiffs in this action.

It is also undisputed, as appears from the testimony of R. R. Herring, one of the plaintiffs, Trustees, and their Vice-Chairman, that he found defendant's letter of August 30, 1933, among the papers of the Trustees in the early part of 1944, and that instead of disclaiming any right to said note, the Trustees actually claimed title to the note and did not disclaim the right to recover on this note until suit was brought and was being heard in the District Court for the Eastern District of North Carolina at Fall Term, 1946.

The witness Herring testified that when the rights on the three notes were reassigned to the plaintiffs by the Liquidator of Consolidated Indemnity and Insurance Company, he notified defendant that plaintiffs would assign to him the rights which they had gotten back by the reassignment. As to this however, he testified: "That was part of our negotiations, that the notes had been lost and we had reassignment and wanted to get settlement on that basis. Q. You only agreed to do that in the event he made settlement? A. I suppose so" (Rec., p. 60).

Petitioner further submits that the plaintiffs, trustees, were charged with the duty to make an investigation which would have disclosed that the note of August 21, 1933, was given in payment of the notes in suit.

"A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made the necessary effort to learn the truth of the matters affecting his interests."

Austin v. *George*, 201 N. C. 380;
Blankenship v. *English*, 222 N. C. 92;
Wynn v. *Grant*, 166 N. C. 39.

Certainly the language of the bond which was delivered with the note, quoted in the Court's finding of fact No. 21 (Rec., p. 169), was sufficient to put plaintiffs on notice and charge them with the duty to investigate and it is clear that investigation would have disclosed that the note of August 21, 1933, for $15,500.00 had been given in settlement of the notes in suit.

It is not sufficient to say that plaintiffs dealt with the compromise note as a renewal note. Every fact in connection with the transaction shows that the compromise note was tendered in *settlement* and not renewal.

The acceptance of an offer of compromise cannot be qualified by any reservations on the part of the party accepting.

Kerr v. *Sanders,* 122 N. C., 635;
Sylva Supply Co. v. *Watt,* 181 N. C. 432;
DeLoache v. *DeLoache,* 189 N. C. 394;
Pruden v. *Railroad,* 121 N. C., 509.

"In *DeLoache* v. *DeLoache,* 189 N. C., at p. 398, the learned former *Associate Justice Varser,* of this Court, in reference to this subject said: 'Business transactions cannot be safely conducted upon secret reservations of mind that are totally inconsistent with the open acts. It was open to plaintiff to refuse to accept check No. 2 if he was unwilling to affirm its provisions in every respect. When he accepted its proceeds he made effective and binding its every stipulation. *Ore Co.* v. *Powers,* 130 N. C. 152; *Aydlett* v. *Brown,* 153 N. C. 334.' "

Lawson v. *Bank,* 203 N. C. 368, at p. 372.
Durant v. *Powell,* 215 N. C. 628.

We repeat in conclusion petitioner's prayer that a writ of certiorari be issued by this Court to the Circuit Court of

Appeals to the end that the judgment of that Court may be reviewed.

Respectfully submitted,

MURRAY ALLEN,
Attorney for Petitioner.

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Raleigh, N. C.

(4689)

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SUPREME COURT OF THE UNITED STATES

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A. H. POWELL, R. R. HERRING, E. N. CLEMENT AND JOHN S. WATKINS, TRUSTEES FOR THE CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE,

Respondents.

BRIEF FOR RESPONDENTS

The Petition for Writ of Certiorari in this case must be denied unless it appears that the Circuit Court of Appeals for the Fourth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

This case was tried before Gilliam, District Judge, without a jury, from whose judgment the petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit. The Circuit Court of Appeals did not disturb the findings of fact of the lower Court and affirmed the lower Court's judgment.

The petition for Writ of Certiorari contains no exceptions or objections to the findings of fact by the trial Court, but the

petitioner in his Petition contends that the conclusions of law reached by the trial Court and the judgment rendered by the trial Court and affirmed by the Circuit Court are in error and should be reversed.

Three notes signed by the petitioner are frequently mentioned throughout the record in this case. Two of these notes, one dated November 25, 1932, for $15,500.00, payable in ninety days, and another note dated February 11, 1933, for $1000.00, payable in sixty days, are the notes in suit. A third note, dated August 21, 1933, in the sum of $15,500.00, is referred to as the compromise note.

The petitioner's contention is that the so-called compromise note was given and accepted in discharge and settlement of the notes in suit, but the petitioner does not contend that he has paid the notes in suit or the so-called compromise note.

The so-called compromise note was transmitted by the petitioner to the First National Bank of Granville, the respondents' predecessor in title to the two notes in suit, with petitioner's letter of August 30, 1933, which appears on pages 6 and 7 of the petition. Also transmitted by said letter was a bond of the Consolidated Indemnity & Insurance Company, purportedly guaranteeing the petitioner's note of August 21, 1933.

The aforementioned letter, together with the aforementioned note and bond, reached the First National Bank of Granville while its affairs were under the control of J. W. Medford, Conservator, who had theretofore been appointed as such Conservator by the Comptroller of the Currency.

The following quotations from the petitioner's said letter unmistakably indicate that the petitioner was making an offer: "With further reference to my conversation with you relative to my notes I wish to advise as follows", and "I am authorized by the Consolidated Insurance & Indemnity Company to offer you my note in the sum of $15,500.00, guaranteed by that

Company, in settlement of all of the notes signed by me, which you now hold".

Medford, as Conservator, was vested with the powers and charged with the duties outlined in and prescribed by U. S. Code, Title 12, Sections 192 and 203.

It is respectfully submitted that Medford, as Conservator, had no power or authority to accept the petitioner's said note in compromise and settlement of petitioner's then obtaining obligations to said Bank, and even though Medford, as Conservator, retained said so-called compromise note, his retention of the same did not constitute an acceptance.

"It is well settled that the plea of payment is an affirmative one and the burden of showing payment is on the one, who relies on same. The burden of proof is a substantial right".

Furst vs. Taylor,
204 N. C., page 603;

Davis vs. Dockery,
209 N. C., page 272.

"It is a fundamental rule of evidence that the burden is on the party, who asserts the affirmative of the issue".

Stein vs. Levins,
205 N. C., page 302.

It is obvious that the petitioner knew at the time of the writing of his letter of August 30, 1933, to the First National Bank of Granville, that its affairs were in the hands of Medford, as Conservator. His letter is thus addressed: "First National Bank of Granville, Oxford, N. C., Attention: Mr. J. W. Medford, Conservator."

The petitioner cannot escape the legal principle that he, the

petitioner, was presumed to know what power and authority Medford, as Conservator, enjoyed.

On or about December 19, 1933, the First National Bank of Granville, which had been restored to solvency, conveyed, made over and assigned a part of its assets to the respondents for liquidation for the benefit of waiving depositors and stockholders, and its remaining assets to a newly formed bank, the Oxford National Bank. A list or schedule of the assets passing to respondents contained the notes in suit and other notes of the petitioner, but did not contain the so-called compromise note. (R. p. 174). However, on or shortly after December 19, 1933, said so-called compromise note and the bond referred to in petitioner's letter of August 30, 1933, and said letter came into the possession of respondents, but it appears that the respondents did not see and did not have knowledge of said letter until in the early part of 1944, when it was found by R. R. Herring, one of the respondents. (Findings of Fact 15, R. p. 265.)

The following appears in Conclusions of Law, Paragraph 2, R. P., 275:

"It is true that the defendant's letter of August 30, 1933, was among the papers and records in the custody of the plaintiffs for a considerable length of time, but it does not appear that the plaintiffs as a board or body of trustees had actual knowledge of the existence of the letter during this period. Mr. Powell, one of the plaintiffs, knew about the plan and had agreed to it, but he does not constitute the body or board of trustees. Evidence shows that Mr. R. R. Herring, the Vice Chairman of the plaintiffs, saw the letter for the first time in the early part of 1944 and there is no evidence that any of the other plaintiffs ever had actual notice of its existence".

Respondents respectfully submit that J. W. Medford, as Conservator, could not have passed on to the First National Bank of Granville any title to the so-called compromise note, nor

could the said Bank, even if it had undertaken to do so, on December 19, 1933, have passed on to the respondents a good title to said note.

From time to time after December 19, 1933, the respondents made demands upon the petitioner for the payment of the two notes in suit, and this the petitioner admits in his answer (Par. 16, R. p. 10), and the petitioner admits (R. p. 87) that no demand was ever made on him for payment of the so-called compromise note.

The petitioner contends, however, that the respondents exercised such dominion over the so-called compromise note as to constitute in law an acceptance of said note. This contention the petitioner predicates upon the terms and provisions of the assignment by respondents of the two notes in suit and the so-called compromise note to the Liquidator of the Consolidated Indemnity & Insurance Company by instrument dated February 8, 1937, which appears on R. p. 263.

The trial Court found that said claim was proved under circumstances described as follows: "This claim was proved with the Liquidator of the Consolidated Indemnity & Insurance Company for the benefit of the defendant, who requested and urged plaintiffs to do so". (R. p. 263.)

In further connection with the filing and proof of this claim the trial Court finds (R. p. p. 263 and 264) "the notes in suit and the alleged compromise note were delivered to the Liquidator of the Consolidated Indemnity & Insurance Company, and were assigned by separate paper-writing as set out, but they were not actually endorsed by the plaintiffs, or any one of them, or by any one else for them".

In connection with the filing and proof of said claim the trial Court made this further finding of fact, (Par. 14, R. p. p. 264 and 265) "Before February 8, 1937, the date on which plaintiffs' claim against the Consolidated Indemnity & Insurance Company was filed and the notes transferred, as well as subsequent to

April 11, 1944, the date of the reassignment, plaintiffs made frequent demands, both oral and in writing, upon the defendant for payment of the notes in suit, but the defendant has made no payment thereon. Demand for payment of the alleged compromise note of $15,500.00 has at no time been made by the plaintiffs or their predecessors in title, nor by any other person in their behalf, and at the trial plaintiffs stated for the record that they make no claim thereon".

In connection with the filing and proof of said claim the trial Court made other important and significant findings, appearing in paragraphs 22, 23 and 24 of "Findings of Fact", (R. p. p. 267 and 268.), which are not quoted, but the respondents urgently call the Court's attention to these paragraphs.

It is respectfully submitted that the petitioner, having requested the respondents to file claim with the Liquidator of the Consolidated Indemnity & Insurance Company, and which, according to the findings of fact, was for petitioner's benefit, should not now be permitted successfully to complain of what the respondents were required by said Liquidator to do in connection with the filing of proof of said claim.

The petitioner further contends that the language of the bond transmitted by the petitioner's said letter of August 30, 1933, was such as to impose on respondents the duty of making a thorough and careful investigation, and that the respondents are legally bound by all disclosures, which such an investigation would have revealed.

Respondents submit that the petitioner's so-called compromise note and said bond and petitioner's said letter of August 30, 1933, were dependent each upon the other to convey or to communicate the petitioner's offer. The letter unfortunately was misplaced and its contents did not come to the attention of the respondents until in the early spring of 1944, at which time the two notes in suit and the so-called compromise note had been lost, through no fault of the respondents.

The cases relied upon by the petitioner in support of this contention are readily distinguishable from the instant case. In the instant case there is no evidence or proof that the respondents were careless or negligent, or that they acted in disregard of what could or should have been apparent to them. On the contrary the petitioner never lost sight of his said letter of August 30, 1933. In fact, R. R. Herring's, one of the respondents, successful search for said letter made during the spring of 1944, was made in consequence of a suggestion made during negotiations with the petitioner in 1944 for a settlement of petitioner's obligations to respondents. Such appears from the questions and answers of the witness, R. R. Herring, appearing on page 11 of the petition for Writ of Certiorari.

It is respectfully submitted that it would be inequitable indeed if the respondents, who had indulged the petitioner from December 19, 1933, until February 8, 1937, and who on said February 8, 1937, filed and proved a claim on the notes in suit with the Liquidator of the Consolidated Indemnity & Insurance Company at the petitioner's request and for the petitioner's benefit, should now be defeated in their suit against the petitioner because of the failure on the part of the respondents to discover the said letter written by petitioner dated August 30, 1933, of which said letter it is apparent that the petitioner at all times knew, but did not disclose until during the negotiations for settlement carried on between respondents and petitioner during the spring of 1944.

The carefully considered and able opinion of the Circuit Court of Appeals in this case clearly indicates that this case has been decided in accordance with applicable local decisions, and said opinion contains references to controlling Statutes and North Carolina opinions, a repetition of which in this Brief is not deemed necessary.

The respondents respectfully submit that there is no merit

in petitioner's petition and respectfully urge the Court to deny said petition.

Respectfully submitted,

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